

BEFORE THE NEBRASKA TAX EQUALIZATION AND REVIEW COMMISSION

Hy-Vee, Inc,
Appellant,

v.

Douglas County Board of Equalization,
Appellee.

Case Nos: 15C 434 & 16C 072,
15C 438 & 16C 075, 15C 440 & 16C 078,
15C 441 & 16C 071, 15C 442 & 16C 080,
15C 443 & 16C 077, 15C 444 & 16C 076

Amended Decision and Order Reversing the
Decisions of the Douglas County Board of
Equalization

For the Appellant:
Brian S. Kruse,
Rembolt Ludtke LL

For the Appellee:
Shakil A. Malik
Deputy Douglas County Attorney

These appeals were heard before Commissioners Robert W. Hotz and Nancy J. Salmon.

I. THE SUBJECT PROPERTY

The Subject Property in Case Nos. 15C 434 and 16C 072 is a commercial parcel located at 14591 Stony Brook Blvd, Omaha, Douglas County, Nebraska. The parcel is improved with an 84,240 square foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 25 and 26 respectively.

The Subject Property in Case Nos. 15C 438 and 16C 075 is a commercial parcel located at 8801 West Center Road, Omaha, Douglas County, Nebraska. The parcel is improved with a 62,808 square foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 31 and 32 respectively.

The Subject Property in Case Nos. 15C 440 and 16C 0078 is a commercial parcel located at 3505 L Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 59,604 square

foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 35 and 36 respectively.

The Subject Property in Case Nos. 15C 441 and 16C 071 is a commercial parcel located at 7910 Cass Street, Omaha, Douglas County, Nebraska. The parcel is improved with an 80,557 square foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 37 and 38 respectively.

The Subject Property in Case Nos. 15C 442 and 16C 080 is a commercial parcel located at 17810 Welch Plaza, Omaha, Douglas County, Nebraska. The parcel is improved with a 77,432 square foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 39 and 40 respectively.

The Subject Property in Case Nos. 15C 443 and 16C 077 is a commercial parcel located at 9707 Q Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 69,656 square foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 43 and 44 respectively.

The Subject Property in Case Nos. 15C 444 and 16C 076 is a commercial parcel located at 10808 Fort Street, Omaha, Douglas County, Nebraska. The parcel is improved with a 70,434 square foot supermarket. The legal description of the parcel and the property record cards for tax years 2015 and 2016 for the Subject Property are found at Exhibits 41 and 42 respectively.

Each of the seven Subject Properties operated as Hy-Vee supermarkets.

II. PROCEDURAL HISTORY

In each of the appeals, the Douglas County Assessor (the County Assessor) had initially determined the assessed value of the Subject Properties and the Taxpayer protested the original determination of the assessed value of each property to the Douglas County Board of Equalization (the County Board). The County Board then set the value of the Subject Properties following the protests by the Taxpayer. The following table summarizes the original determination by the Assessor, and the ultimate decision of the County Board in each appeal:

Case No.	Exhibit	County Assessor's	Decision of the County
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		Determination of Value	Board
15C 434	3	\$6,564,900	\$6,564,900
16C 072	4	\$6,564,900	\$6,564,900
15C 438	9	\$4,282,800	\$4,282,800
16C 075	10	\$4,282,800	\$4,282,800
15C 440	13	\$3,407,900	\$3,407,900
16C 078	14	\$3,407,900	\$3,407,900
15C 441	15	\$7,274,300	\$7,274,300
16C 071	16	\$7,274,300	\$7,274,300
15C 442	17	\$6,034,200	\$6,034,200
16C 080	18	\$6,034,200	\$6,034,200
15C 443	21	\$5,428,200	\$5,428,200
16C 077	22	\$5,672,300	\$5,672,300
15C 444	19	\$5,488,900	\$5,488,900
16C 076	20	\$5,488,900	\$5,488,900

The Taxpayer appealed the decisions of the County Board in all of the above-captioned protests to the Tax Equalization and Review Commission (the Commission). Prior to the hearing, the parties exchanged exhibits and filed a Pre-Hearing Conference Memo. Pursuant to the agreement of the parties, the Commission held a consolidated hearing of the above-captioned appeals on June 13, 2017. The parties stipulated that Exhibits 1 through 58 be received into evidence and the Commission did receive Exhibits 1 through 58 into evidence.

III. STANDARD OF REVIEW

The Commission’s review of the determination by a County Board of Equalization is de novo.¹ When the Commission considers an appeal of a decision of a County Board of Equalization, a presumption exists that the “board of equalization has faithfully performed its

¹ See, Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.), *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 286, 753 N.W.2d 802, 813 (2008). “When an appeal is conducted as a ‘trial de novo,’ as opposed to a ‘trial de novo on the record,’ it means literally a new hearing and not merely new findings of fact based upon a previous record. A trial de novo is conducted as though the earlier trial had not been held in the first place, and evidence is taken anew as such evidence is available at the time of the trial on appeal.” *Koch v. Cedar Cty. Freeholder Bd.*, 276 Neb. 1009, 1019 (2009).

official duties in making an assessment and has acted upon sufficient competent evidence to justify its action.”²

That presumption remains until there is competent evidence to the contrary presented, and the presumption disappears when there is competent evidence adduced on appeal to the contrary. From that point forward, the reasonableness of the valuation fixed by the board of equalization becomes one of fact based upon all the evidence presented. The burden of showing such valuation to be unreasonable rests upon the taxpayer on appeal from the action of the board.³

The order, decision, determination or action appealed from shall be affirmed unless evidence is adduced establishing that the order, decision, determination, or action was unreasonable or arbitrary.⁴ Proof that the order, decision, determination, or action was unreasonable or arbitrary must be made by clear and convincing evidence.⁵

A Taxpayer must introduce competent evidence of actual value of the Subject Property in order to successfully claim that the Subject Property is overvalued.⁶ The County Board need not put on any evidence to support its valuation of the property at issue unless the taxpayer establishes the Board's valuation was unreasonable or arbitrary.⁷

In an appeal, the commission “may determine any question raised in the proceeding upon which an order, decision, determination, or action appealed from is based. The commission may consider all questions necessary to determine taxable value of property as it hears an appeal or cross appeal.”⁸ The commission may also “take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within its specialized knowledge...,” and may “utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.”⁹ The Commission’s Decision and Order shall include findings of fact and conclusions of law.¹⁰

IV. VALUATION

² *Brenner v. Banner Cty. Bd. Of Equal.*, 276 Neb. 275, 283, 753 N.W.2d 802, 811 (2008) (Citations omitted).

³ *Id.*

⁴ Neb. Rev. Stat. §77-5016(9) (2016 Cum. Supp.).

⁵ *Omaha Country Club v. Douglas Cty. Bd. of Equal.*, 11 Neb. App. 171, 645 N.W.2d 821 (2002).

⁶ Cf. *Josten-Wilbert Vault Co. v. Board of Equalization for Buffalo County*, 179 Neb. 415, 138 N.W.2d 641 (1965) (determination of actual value); *Lincoln Tel. and Tel. Co. v. County Bd. Of Equalization of York County*, 209 Neb. 465, 308 N.W.2d 515 (1981)(determination of equalized taxable value).

⁷ *Bottorf v. Clay County Bd. of Equalization*, 7 Neb.App. 162, 580 N.W.2d 561 (1998).

⁸ Neb. Rev. Stat. §77-5016(8) (2016 Cum. Supp.).

⁹ Neb. Rev. Stat. §77-5016(6) (2016 Cum. Supp.).

¹⁰ Neb. Rev. Stat. §77-5018(1) (2016 Cum. Supp.).

A. Law

Under Nebraska law,

[a]ctual value is the most probable price expressed in terms of money that a property will bring if exposed for sale in the open market, or in an arm's length transaction, between a willing buyer and a willing seller, both of whom are knowledgeable concerning all the uses to which the real property is adapted and for which the real property is capable of being used. In analyzing the uses and restrictions applicable to real property the analysis shall include a full description of the physical characteristics of the real property and an identification of the property rights valued.¹¹

“Actual value may be determined using professionally accepted mass appraisal methods, including, but not limited to, the (1) sales comparison approach using the guidelines in section 77-1371, (2) income approach, and (3) cost approach.”¹² “Actual value, market value, and fair market value mean exactly the same thing.”¹³ Taxable value is the percentage of actual value subject to taxation as directed by section 77-201 of Nebraska Statutes and has the same meaning as assessed value.¹⁴ All real property in Nebraska subject to taxation shall be assessed as of January 1.¹⁵ All taxable real property, with the exception of agricultural land and horticultural land, shall be valued at actual value for purposes of taxation.¹⁶

B. Summary of the Evidence

The Taxpayer offered the expert testimony of Thomas Scaletty, a Certified General Real Property Appraiser in the State of Nebraska. He inspected and appraised each of the seven properties in the above-captioned appeal on behalf of the Taxpayer. For each property Mr. Scaletty inspected and appraised, he created a Summary Appraisal Report.¹⁷ He asserted that both of his reports were consistent with generally accepted appraisal practices and Uniform Standards of Professional Appraisal Practice (USPAP). Pursuant to stipulation by the parties, these reports were received into evidence. The effective date of both appraisals was January 1, 2015.¹⁸

¹¹ Neb. Rev. Stat. §77-112 (Reissue 2009).

¹² *Id.*

¹³ *Omaha Country Club v. Douglas County Board of Equalization, et al.*, 11 Neb.App. 171, 180, 645 N.W.2d 821, 829 (2002).

¹⁴ Neb. Rev. Stat. §77-131 (Reissue 2009).

¹⁵ See, Neb. Rev. Stat. §77-1301(1) (Reissue 2009).

¹⁶ Neb. Rev. Stat. §77-201(1) (Reissue 2009).

¹⁷ Exhibits 45, 46, 47, 48, 49, 50 & 51.

¹⁸ Exhibits 45:1, 46:1, 47:1, 48:1, 49:1, 50:1, and 51:1.

In addition to his personal inspection of each of the properties, Mr. Scaletty testified that he utilized other data for his appraisals, including the appraisal database, assessment information, and interviews with brokers. For each of the properties, he considered the Cost Approach, the Sales Comparison Approach, and the Income Approach. Mr. Scaletty testified the he relied most heavily on the Sales Comparison Approach in his appraisal of the seven Subject Properties. As part of his appraisal, he analyzed the market area, physical characteristics, land comparables, and sales comparables of each of the Subject Properties. He also compared the market rent per square foot (PSF) of the comparable properties for each of the Subject Properties.

Case Nos.	Exhibit/ Page	Subject Property	Average Sales Price PSF¹⁹ of Comparable Properties
15C 434 & 16C 072	45:75	14591 Stony Brook Blvd.	\$64
15C 438 & 16C 075	46:75	8801 West Center Road	\$58
15C 440 & 16C 078	47:75	3505 L Street	\$46
15C 441 & 16C 071	48:76	7910 Cass Street	\$67
15C 442 & 16C 080	49:75	17810 Welch Plaza	\$60
15C 444 & 16C 076	50:75	10808 Fort Street	\$60
15C 443 & 16C 077	51:75	9707 Q Street	\$58

Based on his analysis, and relying primarily on the Sales Comparison Approach, Mr. Scaletty appraised the seven Subject Properties as follows:

Case Nos.	Exhibit	Subject Property	Value
15C 434 & 16C 072	45	14591 Stony Brook Blvd.	\$5,480,000
15C 438 & 16C 075	46	8801 West Center Road	\$3,770,000
15C 440 & 16C 078	47	3505 L Street	\$2,680,000

¹⁹ PSF = per square foot.

15C 441 & 16C 071	48	7910 Cass Street	\$5,640,000
15C 442 & 16C 080	49	17810 Welch Plaza	\$5,030,000
15C 444 & 16C 076	50	10808 Fort Street	\$4,230,000
15C 443 & 16C 077	51	9707 Q Street	\$4,300,000

The Taxpayer offered no other evidence.

The County Board offered the testimony of Linda Rowe, the Commercial Supervisor Manager for the County Assessor. She testified that she holds a State Assessor Certificate and a Real Estate License in the State of Nebraska. Ms. Rowe stated that she was responsible for the assessment of commercial property in Douglas County, including retail stores and supermarkets. More specifically, she was responsible for the assessment of the seven Subject Properties for tax years 2015 and 2016.

Ms. Rowe testified that she relied only on the Income Approach in assessing the seven Subject Properties. She stated that she did not use the Sales Comparison Approach because four comparable supermarkets were vacant at the time of sale. In applying the Income Approach, she testified that she relied on an income model built in 2013, even though rents had increased from 2013 to 2015. Using the Income Approach and the income model built in 2013, Rowe testified that the assessments of the comparable properties she relied upon ranged from \$31 PSF to \$129. These were basis for the values proposed by the County Assessor and adopted by the County Board. No other evidence was presented by the County Board.

The seven Subject Properties were assessed as follows:

Case Nos.	Subject Property	Assessed PSF Value
15C 434 & 16C 072	14591 Stony Brook Blvd.	\$78 ²⁰

²⁰ See, Exhibit 25:7 and Exhibit 26:7. \$6,564,900 / 84,242 square feet = \$78 PSF.

15C 438 & 16C 075	8801 West Center Road	\$68 ²¹
15C 440 & 16C 078	3505 L Street	\$57 ²²
15C 441 & 16C 071	7910 Cass Street	\$87 ²³
15C 442 & 16C 080	17810 Welch Plaza	\$78 ²⁴
15C 444 & 16C 076	10808 Fort Street	\$78 ²⁵
15C 443 & 16C 077	9707 Q Street	\$78 ²⁶

The Commission finds that the testimony of Mr. Scaletty and his Summary Appraisal Reports found in Exhibits 45, 46, 47, 48, 49, 50, and 51 represent competent evidence that rebut the presumptions that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations in each of the above-captioned appeals. The testimony of Mr. Scaletty and his appraisal reports provided considerable information on his Sales Comparison analysis. His analysis was well organized and resulted in conclusions that the Commission finds more reliable than those of the County Board. Further, his conclusions are backed by his analysis of the market per square foot values of the comparable properties.

The following comparison illustrates the disparity:

²¹ See, Exhibit 31:7 and Exhibit 32:7. \$4,282,800 / 62,808 square feet = \$68 PSF.

²² See, Exhibit 35:8 and Exhibit 36:8. \$3,408,000 / 59,604 square feet = \$57 PSF.

²³ See, Exhibit 37:11-12 and Exhibit 38:11-12. \$7,274,300 / 83,665 square feet = \$87 PSF.

²⁴ See, Exhibit 39:7 and Exhibit 40:7. \$6,034,200 / 77,432 square feet = \$78 PSF.

²⁵ See, Exhibit 41:7 and Exhibit 42:7. \$5,488,900 / 70,434 square feet = \$78 PSF.

²⁶ See, Exhibit 43:7 and Exhibit 44:9. \$5,428,200 / 69,656 square feet = \$78 PSF, \$5,582,900 / 71,640 square feet = \$78 PSF.

Case Nos.	Subject Property	Assessed PSF Value	Average PSF of Comparable Properties	PSF Value of Appraisals
15C 434 & 16C 072	14591 Stony Brook Blvd.	\$78	\$64	\$65
15C 438 & 16C 075	8801 West Center Road	\$68	\$58	\$60
15C 440 & 16C 078	3505 L Street	\$57	\$46	\$45
15C 441 & 16C 071	7910 Cass Street	\$87	\$67	\$70
15C 442 & 16C 080	17810 Welch Plaza	\$78	\$60	\$65
15C 444 & 16C 076	10808 Fort Street	\$78	\$60	\$60
15C 443 & 16C 077	9707 Q Street	\$78	\$58	\$60

Therefore, the Commission finds that Mr. Scaletty's appraisals of the Subject Properties are clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable and also provide clear and convincing evidence of the actual value of the Subject Properties.

V. CONCLUSION

The Commission finds that there is competent evidence to rebut the presumption that the County Board faithfully performed its duties and had sufficient competent evidence to make its determinations. The Commission also finds that there is clear and convincing evidence that the County Board's decisions were arbitrary or unreasonable in each of the above-captioned appeals.

For all of the reasons set forth above, the decisions of the County Board should be vacated and reversed.

VI. ORDER

IT IS ORDERED THAT:

1. The decisions of the Douglas County Board of Equalization determining the taxable values of the Subject Properties for tax year 2015 and 2016 are vacated and reversed.²⁷
2. The taxable values of the Subject Properties for tax year 2015 are:

Case Nos.	Subject Property	Taxable Value
15C 434	14591 Stony Brook Blvd.	\$5,480,000
15C 438	8801 West Center Road	\$3,770,000
15C 440	3505 L Street	\$2,680,000
15C 441	7910 Cass Street	\$5,640,000
15C 442	17810 Welch Plaza	\$5,030,000
15C 444	10808 Fort Street	\$4,230,000
15C 443	9707 Q Street	\$4,300,000

3. The taxable values of the Subject Properties for tax year 2016 are:

Case Nos.	Subject Property	Taxable Value
16C 072	14591 Stony Brook Blvd.	\$5,480,000
16C 075	8801 West Center Road	\$3,770,000
16C 078	3505 L Street	\$2,680,000
16C 071	7910 Cass Street	\$5,640,000
16C 080	17810 Welch Plaza	\$5,030,000

²⁷ Taxable value, as determined by the County Board, was based upon the evidence at the time of the Protest proceeding. At the appeal hearing before the Commission, both parties were permitted to submit evidence that may not have been considered by the County Board of Equalization at the protest proceeding.

16C 076	10808 Fort Street	\$4,230,000
16C 0077	9707 Q Street	\$4,300,000

4. This Decision and Order, if no appeal is timely filed, shall be certified to the Douglas County Treasurer and the Douglas County Assessor, pursuant to Neb. Rev. Stat. §77-5018 (2016 Cum. Supp.).
5. Any request for relief, by any party, which is not specifically provided for by this Decision and Order, is denied.
6. Each party is to bear its own costs in this proceeding.
7. This Decision and Order shall only be applicable to tax years 2015 and 2016.
8. This Decision and Order is effective for purposes of appeal on July 28, 2017.²⁸

Signed and Sealed: July 31, 2017

Robert W. Hotz, Commissioner

SEAL

Nancy J. Salmon, Commissioner

²⁸ Appeals from any decision of the Commission must satisfy the requirements of Neb. Rev. Stat. §77-5019 (2016 Cum. Supp.) and other provisions of Nebraska Statutes and Court Rules.